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CHARLES ELMORE CROPLEY

No. 386

In the Supreme Court of the United States

October Term, 1935.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants.*

vs.

R. O. JENKINS, *Appellee.*

Appeal From the Supreme Court of the State of Arkansas.

PETITION FOR REHEARING.

NEILL C. MARSH, SR.,
NEILL C. MARSH, JR.,
JOE K. MAHONY,
HENRY S. YOCUM,
R. H. HUDSON,
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vs.

R. O. JENKINS, *Appellee.*

Appeal From the Supreme Court of the State of Arkansas.

PETITION *for* REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the United States:

The appellant, Phillips Petroleum Company, respectfully petitions for a rehearing of this cause upon the following grounds:

1. The court made an unwarranted application of the reserved power of a state to amend corporate charters and declined to pass upon the question of whether or not the statute in question independently of the reserved power to amend corporate charters deprived appellant of the equal protection of the law.

(a) Appellant was admitted to do business in Arkansas *after* the enactment of the statute. If the statute

was a part of corporate charters, it became a part of appellant's authorization to do business originally and not by any power of amendment.

(b) Under the reserved power of a state to amend corporate charters, it retains power only over that which it grants. The purpose of the reserved power is to prevent the charter from operating as a binding contract which cannot be altered or revoked under the provisions of section 10 of article 1 of the Federal Constitution. No contractual rights are claimed by appellant; its only claim is to the equal protection of the law conferred upon it by the Federal Constitution. Not having conferred upon appellant the right to the equal protection of the law by admitting it to do business in the state, the discrimination between corporations and natural persons cannot be justified under the reserved power of the state to amend corporate charters.

2. The court erroneously held that, by the passage of the act in question, the general assembly will be presumed to have determined that conditions in Arkansas warranted the abolition of the fellow-servant rule as to corporations and not as to natural persons. Before the court can properly assume the existence of conditions to justify the discrimination, it must determine what conditions, if found to exist, would sustain the classification; this the court, contrary to custom, has not done. Nor has the general assembly or the State Supreme Court pointed out any conditions existing in the state which would justify the classification. The question for the court, therefore, is whether the mere character of the employer as to being incorporated or unincorporated warrants a different rule of liability.

In specification of the foregoing, the court's attention is respectfully called to the following comment:

I.

We accept the court's determination that a foreign corporation can claim no greater rights in a state than a domestic corporation, and we have no objection to the court's following the State Supreme Court's determination that the provision of section 7137 is a part of the charters of corporations organized in Arkansas since its enactment and that through the power to alter or amend it is included in the charters of corporations earlier organized under the laws of that state. We accept and invoke the rule announced by this court that:

> "Arkansas might have refrained from enactment of statutes creating or authorizing organization of corporations and might have denied to foreign corporations admission to the state. *But it may not enforce any part of the charter of a domestic corporation or any provision of its laws relating to admission of a foreign corporation that is repugnant to the Federal Constitution. If section 7137 is repugnant to the equal protection clause, it is without force as a part of the charter contract or otherwise.*"

In view of that language it is difficult to understand why the court based its opinion upon the reserved power of the state to amend charters of corporations and said that it was unnecessary to decide the question whether, independently of the reserved power to amend charters and of the bases for legislative action upon which the state constitution conditions alterations, the provisions of section 7137 may be sustained as not repugnant to the equal protection clause.

In any event, the court made a misapplication of the power reserved in the state to amend charters of corporations. It was stated by counsel for appellant at the argument, in answer to a question by Mr. Justice CARDOZA, that appellant was admitted to do business in Arkansas *after* the enactment of the statute. The power to amend corporate charters is therefore not involved, for an amendment may be made only to something that has gone before. And, of course, the power to amend is no greater than the power to prescribe in the first instance. So, for the purposes of this case, the statute should be considered as an independent enactment of law or as an enactment of law written into the authorization of appellant to do business in the state—the legal effect is the same.

Notwithstanding the above, the court has grounded its decision upon the reserved power of the state to amend corporate charters, following a process of reasoning which seems to recognize extra power in the state by reason of its own constitutional provisions and statutory enactments. How the state can confer upon itself extra power to legislate with respect to the rights of persons protected by the Federal Constitution is not apparent. In any event, the power to amend corporate charters is irrelevant to this case for a reason additional to the one above suggested, which will be stated.

The purpose of the power reserved by state constitutions to amend corporate charters is that the charter may not constitute a binding contract which the legislature cannot alter or revoke, in view of section 10 of article 1 of the Federal Constitution. It was the decision of this court in the *Dartmouth College Case*, and the suggestion of Mr. Jus-

tice STORY, in his concurring opinion, which prompted the states to provide for the amendment of corporate charters. 4 Wheat. 518, 712, 4 L. ed. 629, 677.

Appellant has never claimed any contractual right with the State of Arkansas which section 7137 would impair, and therefore the court's reference to section 10 of article 1 of the Federal Constitution is wholly irrelevant. Unlike the case of *Texas & N. O. R. R. Co.* v. *Miller,* 221 U. S. 408, cited by the court, no special privilege was granted by the State of Arkansas to appellant (in that case an exemption was granted the railroad company in its charter from liability for the death of any person in its service, even if caused by its negligence). The rights claimed by appellant are only those conferred upon every person by the Fourteenth Amendment to the Constitution of the United States. *The right of equal protection of the laws not having been granted by the State of Arkansas, the right cannot be taken away or affected by any reserved power to amend corporate charters.* The purpose of the reserved power of a state to amend corporate charters and the extent of that power are ably stated by Mr. Justice FIELD, sitting as Circuit Judge in *The Railroad Tax Cases,* 13 Fed. 723, 754. In that case a state statute provided that a mortgage, deed of trust, contract, or other obligation by which a debt is secured should be deducted from the value of the property in making an assessment for taxation, except as to railroad and other *quasi* public corporations. It was sought to justify the discrimination under the reserved power of the state to amend corporate charters. In answering that contention, Mr. Justice FIELD said:

"The state grants to railroad corporations formed

under its laws a franchise, and over it retains control, and may withdraw or modify it. *By the reservation clause it retains power only over that which it grants;* it does not grant the rails on the road; it does not grant the depots along-side of it; it does not grant the cars on the track, nor the engines which move them, and over them it can exercise no power except such as may be exercised through its control over the franchise, and such as may be exercised with reference to all property used by carriers for the public. The reservation of power over the franchise—that is, over that which is granted—makes its grant a conditional or revocable contract, whose obligation is not impaired by its revocation or change. *The Supreme Court established, in the Dartmouth College Case, that the charter of a private corporation is a contract between the corporators and the state, and that it was, therefore, within the prohibition of the federal constitution against the impairment of contracts. To avoid this result the states have generally inserted clauses in their constitutions reserving a right to repeal, alter, or amend charters granted by their legislatures, or to repeal, alter, or amend the general laws under which corporations are allowed to be formed. The reservation relates only to the contract of incorporation, which, without such reservation, would be irrepealable. It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the Supreme Court held that charters are not contracts, and that laws repealing or altering them did not impair the obligation of contracts.* The property of the corporation, acquired in the exercise of its faculties, is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business."

Speaking for this court, Mr. Justice FIELD, in *Tomlinson* v. *Jessup,* 15 Wall. 454, 21 L. ed. 204, said:

> "The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. *It is a provision intended to preserve to the state control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation.*"

To the same effect see: *The Union Pac. R. Co.* v. *United States,* 66 U. S. 700, 719, 25 L. ed. 496, 501; *Shields* v. *Ohio,* 95 U. S. 319, 324, 24 L. ed. 357; *Southern R. Co.* v. *Board of Railroad Commissioners,* 78 Fed. 236, 254 (C. C., N. D., California, opinion by Circuit Judge McKenna); *Hill* v. *Glasgow R. Co.,* 41 Fed. 610, 616 (C. C., D. Kentucky, opinion by Jackson, J., later Justice of the Supreme Court); *San Joaquin & Kings River C. & I. Co.* v. *Stanislaus County,* 113 Fed. 930, 938; *Fidelity Building & Loan Association* v. *Thompson,* 51 S. W. (2d) 578 (Tex.).

By authorizing appellant to do business in Arkansas, *the state did not grant the equal protection of the law; it did not grant freedom from liability for the negligence of an employee resulting in injury to a co-employee.* The first right was granted by the Federal Constitution and the second was granted by the common law. The power to amend corporate charters reserved to the state did not therefore embrace the power to apply one rule of liability to appellant and other corporations and an entirely different rule to individual employers similarly circumstanced. The reasoning of the court, based as it is upon the power to amend corporate charters within the provisions of the constitution of the state, is inapplicable and fallacious. The real question for the court to decide is whether or not a law, wheth-

er treated as a separate enactment or as a part of domestic corporate charters and a part of the authorization of foreign corporations to do business, which provides one rule of liability of corporations to their employees and another rule of liability of individual employers to their employees, deprives corporations of the equal protection of the law. And the solution of this question turns upon whether or not the classification is based upon a real and substantial difference having a reasonable relation to the particular legislation. This question should not be obscured by a discussion of the power of a state to amend corporate charters.

II.

We do not think, however, that the state conferred upon itself any additional powers by the provisions in its constitution for amendment of corporate charters when, in the opinion of the general assembly, the charter "may be an injustice to the citizens of this state," and then only "in such manner, however, that no injustice shall be done to the corporators." It surely cannot be said that the state does an injustice to its citizens by permitting the same rule of liability to apply to corporations and to individuals in the absence of some difference other than the mere character of the employer. And, of course, if those differences exist and if they are real and substantial and have a reasonable relation to the liability of employers to their employees, there would be a basis for classification which would sustain the statute in question as an independent enactment of law under the police powers, and resort to the power of the state to amend corporate charters would not be necessary. Stated otherwise, the state of facts which would justify an enactment of law as an amendment to corporate charters

under the state constitution would also justify a classification independently of the power reserved to amend corporate charters. Likewise, it can hardly be doubted that the provision of the state constitution "that no injustice shall be done to the corporators" would be violated by any statute which deprived the corporation of the equal protection of the law.

The court has not stated, and we know of no decisions holding, that there is any greater presumption in favor of legislation characterized as an amendment to corporate charters than legislation enacted under the police powers of the state. If the statute in question can be justified under the assumption that the state legislature found facts to exist which warranted the placing of greater burdens upon corporate employers than upon individual employers, on the theory of the reserved power in the state to amend corporate charters, then it may also be justified under the same assumption independently of the reserved power to amend corporate charters. And the converse is equally true. Under either theory, therefore, the question is whether this court will presume that there existed facts sufficient to justify the classification. In the opinion, this court said:

> "There is nothing in the record or of which judicial notice may be taken to negative the conclusions of the general assembly upon the matters specified or to show that the distinction made by the statute is a groundless and arbitrary discrimination against corporations. For aught that appears, conditions in Arkansas do not warrant belief that enforcement of the common law fellow-servant rule as to employees' claims for damages on account of personal injuries suffered by them in the service of employers other than those covered by section 7137 might be injurious to citizens

of the state or that the abrogation of the rule would not be unjust to that class of employers. And justly, we think, it may be assumed that, if in Arkansas there existed facts sufficient to constitute the specified bases for legislative action in accordance with the constitutional provision, the general assembly would have abrogated the fellow-servant rule and extended the one made by Sec. 7137 to all employers."

The thought expressed in the last sentence might as well have been applied in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 72 L. ed. 927, where it was held that the character of the owner of property—whether a corporation or a natural person—was not a reasonable basis for classification for the purposes of a gross income tax derived from the operation of taxicabs. *Why did not the court there assume that, if in Pennsylvania there existed facts sufficient to bring individual owners of taxicabs within the just operation of a gross income tax law, the legislature would have extended the law to them?* Why, also, did not the court, in *Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.,* 262 U. S. 544, 67 L. ed. 1112, assume that there existed facts sufficient to justify a distinction between a corporate non-resident of the state and an individual non-resident of the state conducting litigation in the State of Wisconsin and that, if there had not existed facts sufficient to make the distinction, the state legislature would have placed both corporate and individual non-residents in the same class? And why did not the court make similar assumptions in *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666? The answer is, we think, that such an assumption would have been unreasonable, and this court makes reasonable assumptions, only, to sustain leg-

islation. We submit that, *before this court can properly presume the existence of facts upon which the classification could be justly based, it should determine what facts would justify the classification.* The legislature has not called attention to any facts peculiar to that state upon which the statute is based, nor has the Supreme Court of that state pointed out any conditions existing in the state justifying the classification *(Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 66 L. ed. 1044), *and this court has not so much as suggested what kind of facts could justify the classification.* Without determining that question, we submit that it is improper to assume the existence of the necessary facts. In the cases we have examined where the court has upheld the constitutionality of statutes by indulging the presumption that facts existed which justified the classification, the court has stated the possible facts that the legislature may reasonably be deemed to have found to exist. *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580, 79 L. ed. 1070; *Standard Oil Co.* v. *City of Marysville,* 279 U. S. 582, 73 L. ed. 856; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 76 L. ed. 214; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, 75 L. ed. 324; *Ohio, ex rel. Clarke,* v. *Deckebach,* 274 U. S. 392, 71 L. ed. 1115; *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32, 72 L. ed. 770.

Classification of employers for the purposes of liability to employees has been justified only upon two grounds, so far as we have been able to find, namely, *(1)* the hazard of the business *(Missouri Pac. Ry. Co.* v. *Mackey,* 127 U. S. 206, 32 L. ed. 107), and *(2)* the number of employees *(Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 63 L. ed. 527).

Therefore, in order to uphold this legislation, it must be assumed that the legislature found that the businesses of corporations were hazardous and that the businesses of individuals were not, or that corporations employed a number of persons and that individuals did not. In view of the fact that the statute of Arkansas (section 1700, Crawford & Moses' Digest) provides for the formation of a corporation to conduct *any lawful business,* and that no minimum or maximum is provided for the amount of capital stock (section 1701, Crawford & Moses' Digest), it would seem that a presumption that corporations generally are engaged in hazardous businesses or that they employ a number of people would be unwarranted; but, even if that should be assumed, it is not enough. It must further be assumed that natural persons are not engaged in hazardous businesses or do not employ a number of people. *The court must know what is generally known, and that is that there are small corporations and large ones, and there are large and small individual employers; that corporations are engaged in all kinds of businesses, both hazardous and non-hazardous, as are individuals. The conclusion must be that there can be no state of facts which the legislature could have found to justify the discrimination here complained of.*

If the court should continue to treat the legislation in question as having a special and preferred character on account of its characterization by the Supreme Court of Arkansas as an amendment of corporate charters, nevertheless it would seem that in the determination of whether or not the legislation violates constitutional principles the rule with respect to presumptions to sustain the legislation should be no different than that applied to legislation

independently of the amendment of corporate charters—in other words, legislation based upon the police powers of the state. No longer ago than December 16, 1935, this court, speaking through Mr. Justice SUTHERLAND, in the case of *Coalgate* v. *Harvey*, 80 L. ed. Advance Opinions, page 225, in passing upon the validity of an income tax statute exempting money loaned within the state at a rate of interest not greater than 5%, said:

> *"If there be circumstances which will justify the exemption of any income derived from money loaned within the state while taxing the income from that loaned outside, it is for the state legislature to point them out and limit the exemption accordingly. To import any such circumstances into the present situation is to indulge in pure speculation."*

If it was "pure speculation" to presume the *stated* condition that money loaned within the state would be retained and invested in the state, how much greater speculation it is to indulge the presumption that *unnamed* and *undetermined* conditions existed in Arkansas which would warrant the discrimination!

The language of this court, in *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, is apposite:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some *undisclosed and unknown* reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action."

The court apparently minimizes the seriousness and importance of the right of which the statute deprives appellant. The court says: "It [the statute] *merely* substitutes the rule of *respondeat superior* for the common law fellow-servant rule," which, stated otherwise, *might be,* "It *merely* creates a liability which did not exist before." It is readily seen that the word "merely" is scarcely appropriate in that sense. Freedom from liability under the circumstances in this case is a valuable right. It cannot be denied that to take from appellant that exemption while leaving in force the common law rule as to natural persons under the same circumstances deprives appellant of the equal protection of the law, and that the right of which it has been deprived is substantial. The fact, if it is a fact, that it may not be unreasonable or arbitrary to abolish the common law fellow-servant rule and to substitute the rule of *respondeat superior, if equally applied,* in no sense justifies the abolition of the rule as to corporations and not as to natural persons unless there is some real and substantial difference between a corporation and a natural person bearing a reasonable relation to liability to their employees. In other words, it is not necessary that the legislation be so arbitrary as to constitute a deprivation of property without due process of law in order to have the protection of the equal protection clause. This is demonstrated by many decisions of this court, such, for instance, as *Concordia Fire Ins. Co.* v. *Illinois,* 292 U. S. 535, 78 L. ed. 1411, where it was held that a tax on the net receipts of a foreign corporation based on an assessment at their full value when other personal property in the state was assessed at less than its full value violates the equal protection clause. To the same effect see *Hanover Fire Ins. Co.* v. *Carr,* 272 U. S. 494,

71 L. ed. 374. In those cases the corporations were required to pay taxes only on the full value of their property. Ordinarily no one could complain of that, but the complaints in those cases were sustained by this court solely on the ground of discrimination.

Respectfully submitted,

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I hereby certify that, in my opinion, the foregoing petition is well founded and that it is not made for the purpose of delay.

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